

Supreme Court, U. S.

FILED

AUG 12 1977

MICHAEL RODAK, JR., CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1976

No. 76-1624

ILLINOIS BROADCASTING COMPANY, INC.,

and

LINDSAY-SCHAUB NEWSPAPERS, INC.,

*Petitioners,*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,

*Respondents.*

PETITIONERS' REPLY BRIEF  
TO RESPONDENT NCCB'S OPPOSITION

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**PETITIONERS' REPLY BRIEF  
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Respondent National Citizens Committee for Broadcasting (NCCB) filed a single brief, opposing the petition for *certiorari* sought in this case (76-1624) by petitioners Illinois Broadcasting Company, Inc. and Lindsay-Schaub Newspapers, Inc., and the petitions in No. 76-1471 (*FCC v. NCCB, et al.*), No. 76-1521 (*Channel Two Television Company, et al. v. NCCB, et al.*), No. 76-1595 (*National Association of Broadcasters, v. NCCB, et al.*), No. 76-1604 (*American Newspaper Publishers Association v. NCCB, et al.*), and No. 76-1685 (*The Post Company, et al. v. NCCB, et al.*).

The NCCB opposition brief glosses the arguments of the several petitioners. With respect to the petition in this case (76-1624), the NCCB brief does not address, much less controvert the petitioners' strong showing of the necessity for this Court to grant the writ. In particular, the NCCB brief does not even consider the proposition that the decision and opinion of the Court of Appeals went beyond even NCCB's arguments below in directing the Federal Communications Commission to adopt the Court's presumption against the co-ownership of newspaper/radio stations irrespective of the number of other broadcast or print media which may be present in the radio/newspaper community. (Petition, pp. 10-13). NCCB now urges that the Court of Appeals was correct in reversing the non-divestiture FCC's determinations (NCCB Brief, page 13), but seeks to avoid the Supreme Court's review of that reversal by arguing that some further proceedings would be required to implement divestiture (NCCB Brief at p. 14).

The NCCB takes the position, erroneously we submit, that the Court of Appeals simply remanded the proceedings to the Commission and that review by this Court is not now warranted since, under the remand provisions, some further FCC proceeding would be required (NCCB Opposition Brief pp. 14, 16). But this proposition wholly misconstrues both the status and the effect of the Court of Appeals' direction to the FCC. For example, the Court of Appeals directed the FCC to be bound (in any further proceedings) by "a presumption against cross-ownership" and that in such further proceedings there must be a premise of "giving diversity of media ownership controlling weight". (Opinion below, printed at FCC App. in No. 76-1471 at 56-57, 167). Thus, while there may be another order or further proceedings by the FCC if the case is remanded to it without review by this Court,

the portions of the lower court's opinion which affect the instant petitioners, will have been decided.

The NCCB argument that since there would be some further, implementing procedures in the FCC to accomplish the divestiture directed by the Court of Appeals, the lower Court's judgment should not be reviewed now, does not take into account the provisions of 28 U.S.C. §2350,<sup>1</sup> or Rule 19 of this Court.<sup>2</sup> And certainly the Court of Appeals did not envision that its judgment was not final or ripe for review by this Court with respect to existing newspaper/broadcast ownership situations, in ordering, as the Court of Appeals said it had, "that everyone" (existing co-ownership as well as applicants for new facilities) "would be consistently treated under the standards. . ." of no co-ownership "adopted for new license applicants" (Court of Appeals Order of April 7, 1977, on FCC's Motion for Stay of Mandate).<sup>3</sup>

The Commission determined not to require divestiture in such cases as the petitioners';<sup>4</sup> the Court of Appeals directed the Commission to adopt rules looking toward divestiture. The basic constitutional and legal issues underlying such divestiture have been decided by the Court of Appeals, if they are not reviewed and revised by

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<sup>1</sup> Section 2350(a) ". . . and a final judgment of the Court of Appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by Section 1254(1) of this title. \* \* \*"

<sup>2</sup> A review of writ of certiorari may be granted, *inter alia*, where the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court; \* \* \*". \*

<sup>3</sup> Order printed in appendix to FCC's Reply Comments filed Aug. 5, 1977 in No. 76-1471.

<sup>4</sup> Co-ownership of WSOY AM/FM and a daily newspaper in Decatur, Illinois.

this Court. There is no reason to postpone this Court's review for such implementing divestiture orders which would ensue if the directions of the Court of Appeals to the FCC are not changed.

As shown in our opening brief, and not diminished by the NCCB opposition, there are serious and wide ranging constitutional, legal and broadcast/newspaper industry disruptions threatened by the Court of Appeals, which ought to be settled prior to any further action by the FCC. Hence, the NCCB opposition does not gainsay the importance, and the need now, for a grant of the Petition for Certiorari.

Respectfully submitted,

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August 12, 1977

